Supreme Court, U.S.
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No. 94-1783

In The

Supreme Court of the United States

October Term, 1994

ANTHONY G. SCARIANO,

Petitioner,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF INDIANA, and MEMBERS OF THE STATE BOARD OF LAW EXAMINERS OF THE STATE OF INDIANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court should issue a writ of certiorari where:

a. the Court of Appeals applied the correct equal protection analysis to the challenged rule and its determination does not conflict with decisions of this Court or other courts of appeals; and

b. the Court of Appeals applied the correct analysis under the interstate commerce clause and its determination does not conflict with decisions of this Court or other courts of appeals.

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OPINIONS BELOW

The opinion of the Court of Appeals of the Seventh Circuit, in which the dismissal of the complaint was affirmed, is reported as *Scariano v. Justices of the Supreme Court of Indiana*, 38 F.3d 920 (7th Cir. 1994). The Court of Appeals' decision denying the petition for rehearing with suggestion for rehearing en banc is found at 47 F.3d 173 (7th Cir. 1995). The opinion of the District Court is reported as *Scariano v. Justices of the Supreme Court of Indiana*, 852 F. Supp. 708 (S.D. Ind. 1994).

RELEVANT CONSTITUTIONAL PROVISIONS AND REGULATIONS

The Petitioner's statement of "Constitutional Provisions and Regulations Involved" (Petition, pp. 2-5) is correct and complete except to the extent that it has omitted the interpretive notice regarding Rule 6 issued by the State Board of Law Examiners. That notice states:

> At its meeting on April 23, 1992, the State Board of Law Examiners reviewed Admission and Discipline Rule 6 and defined the following terms:
>
> (a) The term "in Indiana" means dealing with Indiana law, representing Indiana clients, or handling cases in Indiana courts, i.e., the applicant must look to the substance of what he or she is doing in the practice that relates to Indiana law courts and clients rather than the physical location of his office.

(b) When determining the extent of the individual's "practice of law" in Indiana for purposes of meeting the "predominantly" requirement, the lawyer should measure his or her practice in terms of overall time spent, rather than in terms of income generated. This determination should be verifiable by time sheets, case records or other evidence.

(c) The term "predominantly" means that the individual's practice in Indiana must exceed, or be equal to, his or her practice in any other jurisdiction.

All attorneys seeking renewal of their conditional admission will be notified by November 15 of the reporting year of the expiration of their conditional license and the requirement to submit the application for renewal. All applications for renewal of conditional admission and fees must be received by January 1 of the next year or the conditional license expires.

(Appendix to Appellant's Brief, p. A-33).

STATEMENT OF THE CASE

Anthony G. Scariano brought this action against the Defendants, alleging that Rule 6 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys (hereinafter, "Rule 6") violates the United States Constitution, both facially and as applied to him. The District Court dismissed Scariano's claims as applied to him for lack of subject matter jurisdiction, pursuant to *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983),

and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). 852 F. Supp. at 713. The District Court dismissed the facial constitutional claims with prejudice for failure to state a claim upon which relief may be granted. The Court of Appeals for the Seventh Circuit affirmed the dismissal.

Rule 6 provides that an attorney who is licensed to practice law in another state, who has actively practiced law for five (5) of the seven (7) years preceding application, and who satisfies certain other requirements may be conditionally admitted to the Indiana bar without passing the bar examination if he or she practices "predominantly in Indiana." Scariano maintains that Rule 6 violates the equal protection clause of the fourteenth amendment and the commerce clause found at article I, section 8 of the United States Constitution. He no longer claims that Rule 6 impermissibly restricts his right to travel, as alleged in his complaint.

Scariano's Petition for Writ of Certiorari misstates the evidence in that it states "if one lawyer bills Illinois clients for 900 hours of work a year and Indiana clients for the same number, while a second lawyer bills Illinois clients for 500 hours and Indiana clients for 800, only the second lawyer may gain admission without taking the Indiana bar" examination. (Petition, p. 12). In the Petitioner's example, both attorneys would be permitted admission without taking the bar examination pursuant to Rule 6, because "predominantly" is defined as: "must exceed *or be equal to*." (Interpretive Notice of State Board of Law Examiners, April 23, 1992).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with decisions of other United States courts of appeal, nor has it resolved an important question of federal law in a way that conflicts with decisions of the Supreme Court of the United States. Rule 6 does not violate the equal protection clause or the interstate commerce clause of the United States Constitution, and the Court of Appeals applied the correct analysis with respect to each of the constitutional claims alleged.

ARGUMENT

I. REVIEW IS NOT WARRANTED OF THE COURT OF APPEALS' DETERMINATION THAT RULE 6 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The Court of Appeals decision that Rule 6 does not violate the equal protection clause does not warrant review because that determination is correct and does not conflict with applicable decisions of other courts of appeals or of this Court.

The Court of Appeals correctly determined that Rule 6 is "subject to rational basis review, under which a law need only be 'rationally related to a legitimate state interest.' " *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 1252 (1993) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam)) (footnote omitted). Indeed, Scariano has conceded both that the "rational relationship" standard is the

proper analysis to be applied in this case, and that the Defendants have a legitimate state interest in ensuring the competence of attorneys who practice law in Indiana. (Petition, p. 11). Moreover, states have traditionally been permitted to exercise extensive control over the admission and conduct of attorneys. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982).

States may clearly draw distinctions among individuals such as those drawn by Rule 6. Indeed, states would be unable to operate effectively without the freedom to do so. It is only when these distinctions amount to "invidious discrimination" that they are found to offend the Constitution. *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549, 554 (E.D. Va. 1973), *aff'd mem.*, 414 U.S. 1034 (1973), (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973)). The classifications created by Rule 6 do not result in any invidious discrimination.

Scariano argues that Rule 6 is not well-tailored to ensure the competence of attorneys practicing in Indiana. Such a challenge must fail under the rational basis standard of review. *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 390-91 (1978). The equal protection clause does not require states to draw distinctions with "mathematical exactitude." *Dukes*, 427 U.S. at 303. The predominant practice requirement addresses the State's legitimate concern that attorneys who are willing to practice in Indiana only on an "intermittent basis" may lack sufficient incentive to master Indiana law. *Sestric v. Clark*, 765 F.2d 655, 661 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986).

Scariano asks this Court to define the relevant class so narrowly as effectively to apply a "least restrictive means" analysis. *See Lowrie v. Goldenhersh*, 716 F.2d 401, 409 (7th Cir. 1983) (citing *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487 (1955)). That analysis has no place in a rational relationship review, however. *Id.*; *see Schumacher*, 965 F.2d at 1272-73.

Scariano cites *Williams v. Vermont*, 472 U.S. 14 (1985), for his argument that Rule 6 "bootstraps" or creates an artificial classification. (Petition, pp. 17-18). Both the argument and the reliance upon *Williams* are misplaced. *Williams* must be distinguished from this case on the basis that the criterion at issue there was *residence* at the time of purchase. *Id.* at 23. Also see *Pontarelli Limousine, Inc., v. City of Chicago*, 929 F.2d 339, 341-42 (7th Cir. 1991). Unlike the "arbitrary" distinction scrutinized in *Williams*, 472 U.S. at 23, Rule 6 "forces familiarity with Indiana law . . . [and] fosters the State's legitimate interest in regulating and maintaining the quality of those persons admitted to practice law . . . " *Scariano*, 852 F. Supp. at 715.

Scariano's objection to Rule 6 is essentially a claim that Rule 6 "result[s] in 'incidental individual inequality.' " *See Martin v. Walton*, 368 U.S. 25, 26 (1961) (quoting *Phelps v. Board of Education*, 300 U.S. 319, 324 (1937)). A rule or regulation which may result in an "incidental individual inequality" does not violate the equal protection clause, however. *Id.* The possibility that one "even exceptionally qualified individual" might be excluded by the effect of Rule 6 does not lead to a conclusion that the rule offends the constitution. *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474, 476 (7th Cir. 1974).

The Court of Appeals correctly applied the rational relationship standard of review to Rule 6 and reached the correct conclusion. There is no set of facts upon which Scariano can prove that Rule 6 offends the equal protection clause. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Review of the Court of Appeals' decision is not warranted, therefore.

II. REVIEW IS NOT WARRANTED OF THE COURT OF APPEALS' DETERMINATION THAT RULE 6 DOES NOT IMPERMISSIBLY INTERFERE WITH INTERSTATE COMMERCE

The essential inquiry under the interstate commerce clause is whether the rule or regulation in question discriminates against out-of-state interests relative to in-state interests. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). Scariano's interstate commerce claim has repeatedly ignored this crucial question, however.

Rule 6 confers no less of a benefit upon out-of-state attorneys than it does on lawyers in Indiana who are otherwise similarly situated. This fact alone is fatal to Scariano's interstate commerce challenge; Rule 6's impact on interstate commerce is "even-handed" and, therefore, permissible. *See Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986).

The Court of Appeals was correct to apply the analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1969). There, this Court stated that a state rule will be upheld against a commerce clause challenge "unless the burden on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. This Court has clearly

stated that the possibility that a greater percentage of individuals adversely affected by a state classification *may* reside outside the regulating state does not indicate that the classification impermissibly interferes with interstate commerce. *CTS Corp.*, 481 U.S. at 88; *see Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119, 123 (1978).

Rule 6 is fundamentally different from the types of commercial regulations created by states for the purpose of "economic protectionism." *See, e.g., Brown-Forman Distillers*, 476 U.S. at 580 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, ___ U.S. ___, 115 S. Ct. 1331, 1335, 1344 (1995). Unlike many other types of "commerce," there is only a finite amount of legal services that can be performed for Indiana clients. Rule 6 permits—even encourages—a portion of that work to be performed by lawyers outside of Indiana, even though Indiana will not benefit from the tax revenues generated by an out-of-state practitioner.

Rule 6 offers the out-of-state attorney an option for admission to the bar in addition to passing the bar examination. It has been held that the bar examination alternative should be taken into account in any commerce clause analysis of a bar admission rule such as Rule 6. *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 864 (4th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986); *Shapiro v. Cooke*, 552 F. Supp. 581 (N.D.N.Y. 1982), *aff'd*, 702 F.2d 46 (2nd Cir. 1983). In *Goldfarb*, the court upheld a bar admission rule containing a "full-time" practice requirement. 766 F.2d at 864. Rule 6 clearly enhances, rather than impedes, interstate commerce. *Shapiro*, 552 F. Supp. at 588.

Finally, the deference displayed by this Court to state rules governing admission to the bar is no less well-placed in the interstate commerce clause context than in any other. *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) (due process clause challenge); *Goldfarb*, 766 F.2d at 863 (commerce clause challenge).

The Court of Appeals for the Seventh Circuit correctly applied the *Pike v. Bruce Church* test to Rule 6 and correctly concluded that it does not impermissibly interfere with interstate commerce. This is not a case of sufficient constitutional dimensions to warrant review of the Court of Appeals' decision.

CONCLUSION

Review of this case is not warranted. The Court of Appeals correctly applied the appropriate tests under both the equal protection and interstate commerce clauses. The decision of the Court of Appeals does not conflict with the opinions of other courts of appeal or with decisions of this Court. Rule 6 is constitutionally permitted and the decision of the Court of Appeals for the Seventh Circuit should remain undisturbed.

Respectfully submitted,

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